IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.8214 OF 2004

Conwood Agencies Private Ltd,
a Company registered under .. .. Petitioner

Vs

1.Namdeo Pandurang Panchal,
2. The Municipal Corporation
of Greater Bombay, a statutory.. .. Respondents

Mr D.S.Parikh with Mr Parimal K.Shroff with Mr Manoj Mhambrey, Ms.Radhika A Pinzara, Mr.Subodh Joshi and Mr.Kalpesh Saxena i/b M/s Parimal K.Shroff & Co., for the petitioner.

Mr. L.K.Tripathi with Mr Indu Prakash, for the respondents.

CORAM : D.B.BHOSALE,J.
DATE : 21st October, 2004.

ORAL JUDGMENT:

1. This petition, filed under Article 227 of the Constitution of India, raises a short question as to whether an instrument, of which an admissibility is in serious dispute on the ground that it was not duly stamped and not registered, could be received in evidence and the opposite party be invited to cross-examine the witness in respect of such instrument without resolving the question as regards its

admissibility.

2. This petition is directed against the order dated 13.9.2004, passed in the course of the trial by the learned Judge of the Bombay City Civil Court, by which he has allowed the plaintiff to examine Ramdhar Ramgarib Kurmi (Patel) to prove a document (Kararnama) dated 26.4.1972 (for short, "the said document") of which an admissibility was seriously challenged, without deciding the objection raised by the petitioner. It was held that the said document, could be received in evidence for collateral purpose. The said document was produced by the plaintiff along with his affidavit of examination-in-chief and in view of the petitioner-defendant's objection that it was not duly stamped and registered, it was marked "X" for identification.

3. Respondent no.1 filed a suit in the City Civil Court, bearing L.C.Suit No.246 of 2002 against respondent no.2 and the petitioner for declaration that the notice dated 21.1.2002 issued under section 351 of the Bombay Municipal Corporation Act, 1888 and the order passed by the Assistant Commissioner of the Bombay

Municipal Corporation dated 14.5.2002 in respect of the questioned structure, was bad in law, void, null and unconstitutional. The trial in the said suit commenced on 30.6.2004. Respondent no.1 filed his affidavit of examination-in-chief on 2.8.2004 and along with the affidavit the said document was produced by respondent no.1. The petitioner took a serious objection to the production and exhibition of the said document on the ground that it was insufficiently stamped and was not registered. In view thereof, though the said document was allowed to be filed along with the affidavit it was not exhibited. It was marked "X" for identification. In view thereof, respondent no.1 sought to examine Ramdhar Ramgarib Kurmi by filing his affidavit of examination-in-chief to prove the said document. The petitioner objected to the examination of Ramdhar Ramgarib Kurmi on the ground that the said document was insufficiently stamped and was not registered. The paragraphs 4 and 5 of the affidavit of examination-in-chief of Ramdhar Ramgarib Kurmi show that he was being examined to prove the said document which has not been allowed in evidence so far and has been marked "X" for identification. According to the petitioner, the said document suffers from the infirmity under section 33 read with sections 34 and 35 of the

Bombay Stamps Act,1958 (for short, "Act of 1958") as also under sections 17 read with section 49 of the Indian Registration Act, 1908 (for short, "Registration Act"). It was urged that if Ramdhar Ramgarib Kurmi is allowed to prove the said document, it will amount to giving effect to insufficiently stamped document which cannot be used even for a collateral purpose and to corroborate oral evidence for the purposes of determining factum of ownership or factum of possession. The learned Judge, while dealing with the objection, though did not decide the admissibility of the document, held that such document is admissible in evidence for collateral purpose.

4. Mr Parekh, learned counsel for the petitioner, at the outset, submitted that keeping in view the provisions of Rule 4 of Order 18 and the judgment of this Court interpreting the said provisions, respondent no.1 cannot be allowed to examine Ramdhar Ramgarib Kurmi. In other words, unless an admissibility of the said document is decided, the examination-in-chief of Ramdhar Ramgarib Kurmi in respect of the said document cannot be taken on record. He further submitted that even if it is assumed that unregistered document, which requires to be registered, can be received in evidence

for collateral purpose to prove the nature and character of possession, in any case, if such document is insufficiently stamped, it cannot be admitted or received in evidence. He placed reliance on the judgment of this Court in **Durgashankar S.Trivedi and Ors Vs. Babubhai B.Parekh, 2003 (4) Bom C.R. 626, Bharat R.Desai and Anr Vs. Naina Mohanlal Bhal, 2004 (2) Bom.C.R. 695.** On the other hand, Mr.Tripathi, learned counsel for respondent no.1, submitted that the document is simply marked "X" for identification and it has not been exhibited so far and, therefore, it is open for the plaintiff to examine the witness to prove the document. He further submitted that in any case the objection raised by the petitioner can be dealt with at the stage of final argument in the suit.

5. Order 18, Rule 4 of the Code of Civil Procedure (for short, "CPC") contemplates that the examination-in-chief of a witness has to be on affidavit and a copy of the affidavit has to be supplied to the opposite party who calls him for evidence. The proviso to sub rule (1) provides that the question of the proof and admissibility of the documents which are sought to be relied upon is subject to the orders of the Court. Order 18 does not exclude the application of the

provisions of Order 13 which speaks of the production, impounding and return of documents. Under Rule 3, the Court is, at any stage of the suit, empowered to reject a document which it considers irrelevant or otherwise inadmissible recording the grounds of rejection. A document which is admitted in evidence has to be enforced by the Court in the manner specified under Rule 4 of Order 13. Under Rule 7, every document which is admitted in evidence or a copy whereof has been submitted shall form part of the record of the suit.

5.1 After considering the aforementioned provisions of CPC, this Court in **Durgashanakr S.Trivedi (supra)** in paragraphs 9 and 10 observed thus :

> "9. While allowing the parties to lead evidence in the form of affidavits, the courts, therefore, have to bear in mind that though the parties are entitled to produce documents along with affidavit, the admissibility of such document is to be decided by the Court before documents are being exhibited in evidence and the decision cannot be postponed till the final disposal of the case or any time after the documents are exhibited in accordance with Order XVIII, Rule 4 CPC. The objection to the admissibility of the document should be dealt with and decided at the

time the affidavit with documents is produced and being taken on record.

10. The admissibility of the document cannot be established by mere filing of the affidavit by the parties but the documents are necessarily required to be tendered by the deponent, while allowing the other side to have an opportunity to contest the admissibility of the document and an appropriate decision of the Court on such contest by the parties is necessary. Undoubtedly, this decision has to be prior to exhibition of the documents in evidence as already stated above. Merely because under Rule 4 of Order 18 the parties are allowed to produce documents along with affidavit it cannot be construed that such documents are to be exhibited without testing the admissibility of such documents. In fact, proviso to sub rule (1) of Rule 4 of CPC itself discloses that the Court has to decide about the admissibility of documents before they are being exhibited in the evidence".

5.2 In **Bharat R.Desai case (supra)**, this Court reiterated the principle of law laid down in Durgashankar Trivedi case. The relevant observations in the said judgment read thus :

> "... .... The question of proof and admissibility must be resolved by the Court in order to ensure that the cross examination and re-examination, if any, then proceeds to take place on the basis of documents which have been held to be proved and which have been admitted in evidence. Deferring the question of proof and admissibility of documents to an uncertain date in the future is neither in the interests of justice nor does it subserve the object of expedition. The Court must therefore at the outset determine the question of proof of admissibility of documents."

5.3 Considering the dictum in the aforementioned judgments of this Court and the provisions of sections 33,34, 36 and 37 of the Act of 1958 and sections 17, 18 and 49 of the Registration Act, in my opinion, if the admissibility of the instrument is being objected to on the ground that it is insufficiently stamped the Court must at the outset, determine the question of its admissibility before allowing the party to rely on such document even for collateral purpose. Insufficiently stamped document cannot be received in evidence for any purpose whatsoever. The question of proof and

admissibility must be resolved by the Court in order to ensure that the cross-examination or re-examination, if any, then proceeds to take place on the basis of documents which have been held to be proved and which have been admitted in evidence. Allowing the party to prove such document by examination of a witness or inviting the opposite party to cross examine such witness in respect of such document cannot be permitted without determining the question of proof or admissibility of document.

6. A document of which registration is compulsory under the Registration Act, ordinarily cannot be received as evidence of any transaction affecting the party. However, it may be used as evidence for any collateral purpose - for any purpose other than that of creating or extinguishing right to immovable property. In other words it cannot be used to prove the terms of the document. It is admissible to prove the nature and character of possession and that section 49 of the Registration Act would not come in the way. As a matter of fact, proviso to section 49 clearly empowers the Courts to admit any unregistered document as evidence of collateral transaction not required to be registered. An unregistered document is,therefore, admissible to

prove the nature and character of possession of the party. In short, an unregistered document can certainly be looked into for collateral purpose, viz. for the purpose of proving the character of party's possession. However, I refrain from expressing any opinion as to whether the said document in the present case can be received in evidence or is admissible even to prove the nature and character of possession, in view of the objection that it was insufficiently stamped and I leave it to the learned Judge who is dealing with the case to decide the said question at appropriate stage.

7. That takes me to consider the objection that the said document was insufficiently stamped. When the document is tendered in evidence by the party while in the witness-box and if an objection is raised by the opposite party that the document is inadmissible in evidence as it is not duly stamped and also for want of registration, it is obligatory upon the learned Judge to apply his mind to the objection raised and to decide the objection in accordance with law. Tendency, sometimes is to postpone the decision to avoid interruption in the process of recording evidence and,therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. Undoubtedly,

in a given case, the Courts can resort to such device. But if the objection is raised as to admissibility of a document on the ground that the document is not duly stamped, it is necessary for the trial Court to decide the objection before proceeding further with the case. In other words, in such a situation the Court should judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case.

7.1 The provisions contained in sections 33,34 and 37 of the Act of 1958 in particular, are clear which provide the procedure to be adopted by a Court whenever a question is raised that an instrument is not duly stamped. Whenever such instrument is tendered in evidence, the Court has to impound it as obligated by section 33 and then proceed as required by section 34. That section empowers the Court to recover deficit stamp duty along with penalty. Section 33 provides that if a person having by law authority to receive evidence and the civil Court is one such person before whom any document chargeable with duty is produced and it is found that such document is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 34 prohibits its admission in evidence till such duty and penalty is

paid. Therefore, unless the stamp duty and penalty is paid, such document is not admissible in evidence. In other words, such document cannot be received in evidence and the opposite party cannot be invited to cross-examine the witness in respect of such document.

7.2 Sub-section (1) of section 37 provides that the Court has power to admit the document in evidence if the party producing the same would pay the stamp duty together with a penalty as provided by section 34 or duty as provided by section 36. When the Court chooses to admit the document on compliance with such condition, the Court need forward only a copy of the document to the Collector, together with the amount collected from the party for taking adjudicatory steps. But if the party refuses to pay the amount aforestated, the Court has no other option but to impound the document and forward the same to the Collector, as provided under sub-section (2) of section 37. On receipt of the document through either of the said avenues the Collector has to adjudicate on the question of deficiency of stamp duty. If the Collector is of the opinion that such document is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same together with the penalty provided by section 34.

Unless the aforestated procedure is scrupulously followed by the Court, a document which is not duly stamped is not liable to be looked into for any purpose or received in evidence. The question of inviting the opposite party to cross-examine the witness to prove such document, does not arise. The opposite party cannot be compelled to cross-examine the witness unless the procedure contemplated under sections 33, 34 and in particular 37 of the Act of 1958 is scrupulously complied with.

8. The difficulty in the present case arises from the fact that the learned Judge, did not decide the objection raised by the opposite party as to admissibility of the said document and allowed the plaintiff to place it on record and marked it as "X" for identification. When another witness was sought to be examined to prove the said document, once again the objection was raised when the learned Judge has declined to decide the objection on merits holding that it could be used for a collateral purpose. I am afraid, in view of the aforementioned well settled position in law, the learned Judge ought to have either decided whether the said document was duly stamped or not or followed the procedure contemplated under sections 33,34 and 37 of

the Act of 1958. Having not done so, the plaintiff cannot be allowed to examine Ramdhar Kurmi to prove the said document even for collateral purpose. If the opposite party, i.e. the petitioner is invited to cross examine him it may cause serious prejudice to the rights of the parties.

9. In the result, the petition succeeds. The learned Judge shall deal with the case keeping in view the observations made in this judgment. In so far as the issue of admissibility of unregistered document for collateral purpose is concerned, that also may be decided in the light of the observations made in this Judgment and in accordance with law before inviting the petitioner to cross-examine Mr Ramdhar Kurmi. If the learned Judge reaches a conclusion that the said document was insufficiently stamped, he may follow the procedure as reflected in the foregoing paragraphs of the judgment and further if he is required to forward the document to the Collector, he may give such direction as may be necessary for speedy disposal of the case. Rule is accordingly disposed of.

10. Certified copy expedited.

(D.B.BHOSALE, J.)

HIGH COURT
CIVILI APPELLATE SIDE

WRIT PETITION NO.8214 OF 2004

Date of Judgment:

21st October, 2004

For approval and signature

THE HON'BLE MR.JUSTICE D.B.BHOSALE.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad or Goa offices?